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Asiabio Capital Sdn Bhd v Seacera Group Bhd

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HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24NCC-95–09 OF 2021
SM KOMATHY SUPPIAH J
15 DECEMBER 2021

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Civil Procedure — Setting aside — Ex parte order — High Court granted ex parte order pursuant to ss 366 and 368 of Companies Act 2016 ('CA 2016') to convene creditor's meeting to consider and vote on proposed scheme of arrangement and to restraint proceedings against company — Application to set aside ex parte order — Whether requirement under s 368(2)(a) of CA 2016 had been complied with — Whether ex parte order ought to be set aside

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Companies and Corporations — Arrangement, scheme of — Restraint of proceedings — High Court granted ex parte order pursuant to ss 366 and 368 of Companies Act 2016 ('CA 2016') to convene creditor's meeting to consider and vote on proposed scheme of arrangement and to restraint proceedings against company — Application to set aside ex parte order — Whether requirement under s 368(2)(a) of CA 2016 had been complied with — Whether ex parte order ought to be set aside — Companies Act 2016 ss 366 & 368(2)(a)

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Asiabio Capital Sdn Bhd ('the applicant') was the substantial shareholder of Seacera Properties Sdn Bhd ('Seacera'). Seacera was an ailing company with many debts and multiple legal suits against it. As such, Seacera and the applicant came up with a restructuring scheme ('the proposed scheme of arrangement'). On 29 September 2021, the court granted an ex parte order ('the ex parte order') to the applicant and Seacera pursuant to ss 366 and 368 of the Companies Act 2016 ('the CA 2016') to convene a creditor's meeting to consider and vote on the proposed scheme of arrangement and a further order restraining proceedings against Seacera for a period of 90 days. On 15 October 2021, Synergy Platform Sdn Bhd ('Synergy'), a scheme creditor, applied to set aside the ex parte order on the grounds, inter alia, that the total debts proposed to be settled under the restructuring scheme did not meet the 50% requirement under s 368(2)(a) of the CA 2016. In this regard, the applicant stated that the debts due to the subsidiaries and directors were in the books but had not been included in the proposed scheme to maintain the independence of the proposed scheme. The applicant further argued that a company's total liabilities was not equivalent to the total value of the creditors' debts. From the accounting principle point of view, the liabilities and debts were different and the financial statement was prepared according to the accounting principles. As

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such, the percentage of 50% of all creditors had been met with. The issue was whether s 368(2)(a) of the CA 2016 had been complied with.

Held allowing Synergy's application and setting aside the ex parte order with costs of RM13,000:

(1) The court rejected the applicant's contention that in considering whether the proposed scheme involved more than 50% of its creditors, it was entitled to exclude the debts due to subsidiaries and directors from the proposed scheme. No authorities were given in support of this proposition. The provision was clear and unambiguous, and the law could not be circumvented as a matter of convenience. Section 368(2)(a) of the CA 2016 required the proposed scheme to involve more than 50% of its creditors but this was not proven in the present case. The applicant and Seacera were clearly in breach of the strict requirement of s 368(2) of the CA 2016. On this ground alone, Synergy was entitled to set aside the ex parte order granted to the applicant (see paras 16–17).

[Bahasa Malaysia summary

Asiabio Capital Sdn Bhd ('pemohon') ialah pemegang saham utama Seacera Properties Sdn Bhd ('Seacera'). Seacera adalah sebuah syarikat yang menanggung banyak hutang dan menghadapi pelbagai saman undang-undang terhadapnya. Oleh itu, Seacera dan pemohon telah mebuat satu skim penstrukturan semula ('skim penstrukturan yang dicadangkan'). Pada 29 September 2021, mahkamah memberikan perintah ex parte ('perintah ex parte tersebut') kepada pemohon dan Seacera menurut ss 366 dan 368 Akta Syarikat 2016 ('AS 2016') untuk memanggil mesyuarat pemiutang-pemiutang bagi mempertimbangkan dan mengundi skim penstrukturan yang dicadangkan dan perintah lanjut bagi menghalang perbicaraan terhadap Seacera untuk tempoh 90 hari. Pada 15 Oktober 2021, Synergy Platform Sdn Bhd ('Synergy'), salah satu pemiutang skim, memohon untuk mengenepikan perintah ex parte tersebut atas alasan, antara lain, bahawa jumlah hutang yang dicadangkan untuk diselesaikan di bawah skim penstrukturan semula tersebut tidak memenuhi keperluan 50% di bawah s 368(2)(a) AS 2016. Berhubung dengan perkara ini, pemohon menyatakan bahawa hutang yang perlu dibayar kepada anak-anak syarikat dan pengarah terdapat di dalam buku tetapi tidak dimasukkan dalam cadangan skim bagi tujuan untuk mengekalkan kebebasan skim yang dicadangkan. Pemohon seterusnya berhujah bahawa jumlah liabiliti syarikat tidak bersamaan dengan jumlah nilai hutang pemiutang-pemiutang. Dari sudut prinsip perakaunan, liabiliti dan hutang adalah berbeza dan penyata kewangan disediakan mengikut prinsip perakaunan. Oleh itu, peratusan 50% daripada keseluruhan pemiutang-pemiutang telah dipenuhi. Isu yang berbangkit adalah sama ada s 368(2)(a) AS 2016 telah dipatuhi.

Diputuskan, membenarkan permohonan Synergy dan mengenepikan

perintah ex parte tersebut dengan kos sebanyak RM13,000:

(1) Mahkamah menolak hujahan pemohon bahawa dalam mempertimbangkan sama ada skim yang dicadangkan melibatkan lebih daripada 50% pemiutangnya, ia berhak untuk mengecualikan hutang yang terhutang kepada anak-anak syarikat dan pengarah daripada skim yang dicadangkan. Tiada autoriti diberikan untuk menyokong hujahan ini. Peruntukan tersebut jelas dan tidak mengelirukan dan undang-undang tidak boleh dielakkan sesuka hati. Seksyen 368(2)(a) AS 2016 menghendaki skim yang dicadangkan tersebut melibatkan lebih daripada 50% pemiutangnya tetapi ini tidak dibuktikan dalam kes semasa. Pemohon dan Seacera jelas melanggar syarat ketat s 368(2) AS 2016. Atas alasan ini sahaja, Synergy berhak untuk mengenepikan perintah ex parte yang diberikan kepada pemohon (lihat perenggan 16–17).]

Cases referred to

Mansion Properties Sdn Bhd v Sam Chin Yen & Ors [2021] 1 MLJ 527, FC (refd)

Legislation referred to

Companies Act 2016 ss 366, 368, 368(2), (2)(a)

Earnst Azad (Anne Packianathan with him) (Earnst Azad & Assoc) for the appellant.

Renu Zechariah (Cheryl Kwan with him) (Rosley Zechariah) for Synergy Platform Sdn Bhd.

SM Komathy J:

[1] The applicant, Asiabio Capital Sdn Bhd, is a wholly owned subsidiary of Fintec Global Bhd, a company listed on the ACE Market of Bursa Malaysia Bhd. The applicant is a substantial shareholder of Seacera Properties Sdn Bhd ('Seacrea') holding 19.6% equity interest therein. Seacrea is a public listed company listed on the Main Market of Bursa Malaysia Securities Bhd and its principal activities are manufacturing, trading and marketing of all kinds of ceramic tiles and related products.

[2] Seacrea is an ailing company with many debts and multiple legal suits against it. As such, Seacrea and the applicant came up with a restructuring scheme. In this regard, it decided to place its 148 trade creditors into a class of creditors under the said restructuring scheme.

[3] On 29 September 2021, I granted an ex parte order to the applicant and Seacrea pursuant to ss 366 and 368 of the Companies Act 2016 ('the CA 2016')

to convene a creditors meeting to consider and vote on the proposed scheme of arrangement and a further order restraining proceedings against Seacera for a period of 90 days.

[4] On 15 October 2021, Synergy Platform Sdn Bhd ('Synergy'), a scheme creditor, applied to set aside the ex parte order dated 29 September 2021. The four main grounds it relies on are that the 29 September 2021 order is invalid as:

(a) it was obtained in breach of the precondition stipulated in s 368(2) of the CA 2016;

(b) it was obtained based on averments that were untrue in the applicant's affidavit;

(c) the following creditors had been left out of the proposed scheme:

(i) Luqy Communication Sdn Bhd;

(ii) MDI Energy Sdn Bhd;

(iii) SA Glory Sdn Bhd;

(iv) Zaike Global Resources Sdn Bhd; and

(v) Ismail bin Othman.

(d) there were three previous attempts to restructure Seacera (and its subsidiaries) under the same provisions of the CA 2016 by way of OS BA-24NCC-144 of 2019 ('OS 143'), OS BA-24NCC-70–20 of 2020 ('OS 70') and BA-24NCC-141 of 2020 ('OS 141').

SYNERGY'S SUBMISSIONS

[5] Synergy submits that to obtain a restraining order under s 368(2)(a) of the CA 2016, it is incumbent on the applicant to show proof that the restructuring scheme involves more than 50% of its creditors. It contends that the financial statement of Seacreas (at p 5 of the explanatory statement) demonstrates that its total current liabilities is as follows:

Current liabilities	
Trade and other payables	36,812,000
Provision of expenses	262,000
Amount owing to subsidiaries	23,995,000
Amount owing to directors	79,000
Loan and borrowings	14,937,000
Total liabilities	76,085,000

[6] It argues that as Seacrea's 'total current liabilities' stand at RM76,085,000, whilst the debts proposed to be settled under the restructuring scheme total RM36,811,946, this makes up approximately 48% of the total debts of the company which does not meet the 50% requirement under s 368(2)(a) of the CA 2016.

[7] Synergy also points out that the debts owed to the creditors that have been excluded from the proposed scheme amounts to RM65,700,000. It argues that if the excluded debts are included, the scheme proposed will only be dealing with approximately 25% of its total debts.

[8] Synergy next contends that some of the averments made in Seacrea's affidavit as regards the identity of its 143 trade creditors and the amounts owing to them need to be investigated further as contradictory averments were made in this regard in the three earlier restructuring proceedings. By way of illustration, Synergy points out that Vizione Builders Sdn Bhd was not listed as a creditor of Seacrea in the three earlier restructuring proceedings but has suddenly emerged as a creditor in these proceedings for the substantial sum of RM12,999,850. Synergy contends that it is obvious that this is a fraudulent transaction as the managing director of Vizione's holding company, Vizione Holdings Sdn Bhd has denied this transaction.

[9] Synergy also disputes the applicant and Seacrea's assertion that Suong Sdn Bhd, Pasukhas Sdn Bhd, Anzo Construction Sdn Bhd and Amazing Symphony Sdn Bhd are also the former's trade creditors. It takes the position that the latter's accounting records are seriously in question as the allegations made here and the preceding paragraphs have not been rebutted or responded to.

[10] Synergy further submits that although the courts in the three earlier restructuring proceedings had found that the companies (at [4](c)) are creditors of Seacrea, the applicant has deliberately and without justification excluded them from the proposed scheme in the instant case. It argues that the applicant and Seacrea cannot exclude them and make a compromise only with the class of trade creditors it has identified in the scheme presented to the court. By excluding them, the applicant and Seacrea have been not come to court with clean hands and misled the court.

APPLICANT AND SEACREA'S SUBMISSIONS

[11] The applicant denies that the proposed scheme does not compromise 50% of the total creditors as required under s 368(2)(a) of the CA 2016. It accepts that the debts due to subsidiaries and directors are in the books but have not been included in the proposed scheme to maintain the independence of the

proposed scheme. It contends that if the said debts were to be included, it will have a material effect on the percentage and will defeat the genuine intention of Seacrea to settle the trade creditors.

[12] It further contends that a company's total liabilities is not equivalent to the total value of creditors' debts. From the accounting principle point of view, the liabilities and debts are different and the financial statement is prepared according to accounting principles. As such, the percentage of 50% of all creditors has been met with.

[13] The applicant next contends that Seacrea has a discretion not to compromise with all the creditors. It argues that s 368(2)(a) of the CA 2016 permits it to exclude a creditor or a group of creditors from a proposed scheme and make a compromise with a class of creditors. It argues that as the proposed scheme in the instant case involves only the trade creditors, it is permissible to exclude the creditors (at [4](c)) as they do not fall within the said identified class of creditors.

STATUTORY PROVISIONS

[14] Before I consider the rival submissions, it is convenient to set out the statutory provisions relevant to this application. Section 368 insofar as relevant reads as follows:

> (1) If no order has been made or resolution passed for the winding up of a company and a compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the court may, in addition to any of its powers, on the application in a summary way of the company or any member or creditor of the company, restrain further proceedings in any action or proceeding against the company except by leave of the court and subject to any terms as the court may impose.
>
> (2) The court may grant a restraining order under subsection (1) to a company for a period of not more than three months and the court may on the application of the company, extend this period for not more than nine months if —
>
> (a) the court is satisfied that there is a proposal for a scheme of compromise or arrangement between *the company and its creditors or any class of creditors representing at least one-half in value of all the creditors*. (Emphasis added.)

[15] The parties are in agreement that the aforesaid provisions are mandatory provisions and non compliance could render the restraining order liable to be set aside as was decided by the Federal Court in the oft-cited case of *Mansion Properties Sdn Bhd v Sam Chin Yen & Ors* [2021] 1 MLJ 527. Equally,

it is not in dispute that to secure a restraining order pursuant to s 368(2)(a), it is incumbent on an applicant to show that the proposed scheme involves more than 50% of its creditors.

WHETHER S 368(2)(A) HAS BEEN COMPLIED WITH

[16] As regards this issue, I have considered the submissions of both counsels and reject the applicant's contention that in considering whether proposed scheme involves more than 50% of its creditors, it is entitled to exclude the debts due to subsidiaries and directors from the proposed scheme for the reason advanced by it at paras [11]–[12]. No authorities are given in support of this proposition. In my judgment, the provision is clear and unambiguous, and the law cannot be circumvented as a matter of convenience. Section 368(2)(a) requires the proposed scheme to involve more than 50% of its creditors. That is not the case here.

[17] The applicant and Seacrea are clearly in breach of the strict requirement of s 368(2) of the CA 2016. On this ground alone, Synergy is entitled to set aside the ex parte order granted to the applicant. In view of my conclusion, it becomes otiose to consider the other grounds on which the validity of the ex parte order is challenged.

[18] As the applicant has failed to meet the mandatory requirement in s 368(2) of the CA 2016, I allow Synergy's application and set aside the ex parte order dated 29 September 2021 with costs of RM13,000.

Synergy's application allowed; ex parte order set aside with costs of RM13,000.

Reported by Dzulqarnain Ab Fatar